No. 93-1260

In the

Supreme Court of the United States

October Term, 1993

UNITED STATES OF AMERICA,
Petitioner,

v.

ALFONSO LOPEZ, JR.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

IDENTITY AND INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) submits this amicus curiae brief in support of respondent Alfonzo Lopez. Written consent to the filing of this brief has been granted by counsel to all parties and has been lodged with the Clerk of this Court.

PLF is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest.

PLF has over 20,000 contributors and supporters located throughout the country and maintains its principal office in Sacramento, California. The Foundation's policy is set by a Board of Trustees composed of concerned citizens, the majority of whom are attorneys. PLF's Board evaluates the merits of any contemplated legal action and authorizes such action only where the Foundation's position has broad support within the general community. Such authority has been granted in this action.

Amicus seeks to augment the historical discussion of congressional authority under the Commerce Clause of the United States Constitution. PLF has participated in numerous cases involving the Commerce Clause. *E.g.*, *Wilson v. Biggs*, No. 93-772 (Jan. 18, 1992), *denying cert. to*, 1 F.3d 1537 (9th Cir. 1993). *Environmental Protection Agency v. Brown*, 431 U.S. 99 (1977); *United States v. Osteen*, No. 93-6398 (6th Cir.), *reviewing*, *United States v. Cortner*, 834 F. Supp. 242 (M.D. Tenn. 1993). PLF has also participated in many cases addressing the superfluous legal obstacles that thwart effective law enforcement. *E.g.*, *Illinois v. Gates*, 462 U.S. 213 (1983) (arguing for the "good faith exception" to the exclusionary rule). PLF's experience in the above areas will provide an additional viewpoint to this case.

Congressional action beyond its constitutional authority, effected in the name of whatever "national emergency" happens to stoke the political fires, undermines this Nation's concept of ordered liberty as envisioned by the Ratifiers of the Constitution. "By giving the government unlimited powers, the most arbitrary rule can be made legal; and in this way a democracy may set up the most complete despotism imaginable." Friedrich A. Hayek, THE ROAD TO SERFDOM 82-83 (1944). Our federal system was established to prevent this, yet it is being undermined through a seemingly benevolent, yet misguided federal intrusion into domestic matters having little or no connection with interstate

commerce. It is on this basis that Pacific Legal Foundation submits this brief amicus curiae.

STATEMENT OF THE CASE

PLF adopts respondent's Statement of the Case and incorporates that portion of respondent's brief herein.

OPINION BELOW

In *United States v. Lopez*, 2 F.3d 1342 (5th Cir. 1993), the Fifth Circuit Court of Appeals held 18 U.S.C. § 922(q) (Supp. 1993) (Gun Free School Zones Act or Section 922(q)), to be beyond the scope of the congressional commerce power. 2 F.3d at 1367-68.[1]

Alfonzo Lopez, Jr., a San Antonio High School senior, was caught on school grounds with a handgun. *Id.* Mr. Lopez was charged with violating Texas Penal Code § 46.04(a), which prohibits possession of a firearm on school property. *Id.* at 1345 n.1. State charges were later dropped in favor of a federal prosecution under Section 922(q). *Id.* After being found guilty in the District Court, Mr. Lopez' successful appeal to the Fifth Circuit centered on the constitutionality of Section 922(q).

The Fifth Circuit noted that Section 922(q) made it a federal crime to carry an unloaded firearm in an unlocked suitcase on the public sidewalk in front of one's home if the sidewalk happens to be within 1000 feet of a tiny church kindergarten. 2 F.3d at 1346 n.4. Quoting this Court's opinions in *Gregory v. Ashcroft*, 501 U.S. 452, 115 L. Ed. 2d 410 (1991), and *New York v. United States*, 120 L. Ed. 2d 120 (1992), the court below stated that though the text of

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[1] The court below also noted that the indictment failed to allege a nexus with interstate commerce. Thus, it could not be sustained. *Id.* at 1368.

the Tenth Amendment does not affirmatively define the limits of the commerce power, "the reach of that power is not *un*limited, else there would be nothing on which the Tenth Amendment could operate." *Lopez*, 2 F.3d at 1347. The lower court then discussed this Court's opinion in *United States v. Bass*, 404 U.S. 336 (1971), which construed the federal "felon in possession" statute to maintain the sensitive state-federal balance. *Lopez*, 2 F.3d at 1347. The court below noted that the current "felon in possession" provision, 18 U.S.C. § 922(g), now contains a clear nexus to interstate commerce, a caveat Section 922(q) lacks. *Id.*

The court thoroughly outlined the history of federal firearms regulation, showing that despite the expansion of congressional regulation since the New Deal, Section 922(q) goes well beyond prior enactments and exceeded the congressional commerce power. The court noted that every single firearms regulation at the federal level applied *not* to the mere passive possession of an ordinary firearm by an ordinary person, but almost exclusively to regulating commercial transactions, distribution, and practices associated with the firearms business. *Lopez*, 2 F.3d at 1348-57. In other words, the regulated activities all had an express nexus to interstate commerce. Statutes that reached intrastate commercial entities or activities, or related transactions, were enacted "in order to control firearms traffic "'moving in or otherwise affecting interstate commerce.'" *Id.* at 1351. Section 922(q) also lacked this characteristic. The court below also discussed and distinguished the "few, discrete exceptions" to the rule limiting federal regulation to commercial transactions or interstate activity. *Id.* at 1354.

With that history, the Fifth Circuit turned to Section 922(q) and its legislative history, neither of which makes any mention of interstate commerce. *Id.* at 1359. Further, even

the President of the United States questioned the constitutionality of Section 922(q). *Id.* 1359-60 & n.39.

The Fifth Circuit then analyzed our Commerce Clause jurisprudence, claiming that a series of cases, culminating in *Wickard v. Filburn*, 317 U.S. 111 (1942), restored the commerce power to its purported breadth under *Gibbons v. Ogden*, 22 U.S. 1 (1824). 2 F.3d at 1360. But it also noted that the *Gibbons* Court stated that Article I of the Constitution does not include every type of commerce, nor intrastate commerce. *Id.* at 1361. The Court also stated that modern doctrine (*e.g., Wickard*), required a "*substantial economic effect on interstate commerce.*" *Id.* Otherwise, the Fifth Circuit noted, the chain of causation could be infinite, reaching every private activity, because in some theoretical sense it would affect interstate commerce. *Id.* at 1362.

The lower court recognized that judicial deference to Congress was based on either the text of the statute, legislative findings, or inferred intent from legislative history showing a nexus with interstate commerce. *Id.* at 1362-63 (citing, *e.g., Katzenbach v. McClung*, 379 U.S. 294 (1964)). Section 922(q) has none of these. *Id.* at 1363.

The lower court continued, stating that a congressional enactment, while presumed constitutional, is entitled to less deference if it appears "to be within a specific prohibition of the Constitution, such as those of the first ten amendments." *Id.* at 1364 (quoting *United States v. Carolene Products, Co.*, 304 U.S. 144, 152-53 n.4 (1938)). Section 922(q) represents an "incursion by the Federal Government into territory long occupied by the States," *i.e.*, education and simple firearms possession. *Id.* Employing the "plain statement" rule, the court below required that, if Congress intends to alter the fundamental constitutional balance between the state and federal governments, it must

make its intention to do so clear in the language of the statute. *Id.* at 1365 & n.48.

Thus, because Section 922(q): (1) reaches even the most remote acts of mere passive possession, having no relation to interstate commerce; (2) offers no hint of a congressional determination that such activity was related to interstate commerce; (3) "plows through new ground and represents a sharp break with the long-standing pattern of federal firearms legislation," *id.* at 1366; and also because (4) mere passive possession of a firearm was distinguishable from the "class of activities" cases such as *Wickard*; the lower court held Section 922(q) unconstitutional. *Id.* at 1366-68 & nn. 49, 50 & 51.

SUMMARY OF THE ARGUMENT

The Gun Free School Zones Act, while seemingly virtuous, undermines our federal system. The Fifth Circuit correctly considered individual liberty and the interests of the States in declaring Section 922(q) beyond the scope of congressional commerce power. No other congressional enactment has intruded so far into an area better left to the States--passive, individual, noncommercial, nontransactional, intrastate acts. The statute lacks any congressional finding of the requisite economic effect on interstate commerce and an interstate commerce nexus as an element of the crime. It also conflicts with the constitutional text, the Bill of Rights, applicable precedent, and the intent of the Ratifiers. While case such as *Heart of Atlanta Motel* upheld the congressional prohibition of certain commercial activities of certain businesses that were found by Congress to substantially affect interstate commerce, the present activity goes much further. It prohibits private, noncommercial acts within 1,000 feet of the property line of any school, even though such acts were

never found by Congress to affect interstate commerce in any way.

If this act is upheld, will Congress next be able to extend its reach to any activity within 1,000 of the Heart of Atlanta Motel, or Mr. Filburn's wheat farm (*see Wickard v. Filburn*)? May the 1,000 foot zone next be extended to one mile, or even 1,000 miles? If the Second and Tenth Amendments are ignored here, may the First or Fifth Amendments be ignored next?

Mr. Lopez, a teenager, could and should be prosecuted by *Texas* authorities *under state law* for possessing a firearm *on* school property. Such a criminal prohibition is immeasurably different from the one at issue here, which would also criminalize and federalize the mere possession of an otherwise legal, ordinary firearm. Such regulation is plainly better left to the States. Otherwise, the Ratifiers' worst fear--of an unrestrained, centralized, potentially despotic seat of power--will be realized. For these reasons, Section 922(q) should be held unconstitutional by this Court.

ARGUMENT

I

THE GUN FREE SCHOOL ZONES ACT UNDERMINES OUR FEDERAL SYSTEM, WHICH WAS CREATED TO PROTECT INDIVIDUAL LIBERTY

The Tenth Amendment of the United States Constitution states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. Amend. X. The Constitution delegates to

Congress the power "[t]o regulate Commerce ... among the several States." U.S. Const. Art. I, § 8, cl. 3. The Fifth Circuit referred to both of these provisions to question whether Congress may regulate an individual's mere possessory act that is intrastate, noncommercial, and has not been found by Congress to have any effect on interstate commerce. *Lopez*, 2 F.3d *passim*.

Most of this Court's recent jurisprudence dealing with the Tenth Amendment and the authority of Congress under its Article I powers has dealt with subjecting state governments to generally applicable laws. *E.g., New York v. United States*, 120 L. Ed. 2d at 140. The government attempts to undercut the reasoning of the Fifth Circuit by misconstruing this case law. According to petitioner, because this Court has reviewed Commerce Clause questions as they relate to state sovereignty more often than private activity, it must hold state sovereignty in higher regard than individual liberty. *See, e.g.*, Brief for the United States at 28. A more credible reason for this past focus on state sovereignty, however, is that Congress has never intruded so far into the private lives of individuals *without specifically finding that the given activity has a substantial effect on interstate commerce and requiring a nexus with interstate commerce as an element of the crime. C.f., Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 244-53 (1964).

Moreover, the government's argument that state sovereignty is worthier of constitutional protection than personal liberty is contradicted by what this Court has identified as the fundamental purpose of our federal structure in *New York v. United States*, 120 L. Ed. 2d at 154:

> The Constitution does not protect the sovereignty of States for the benefit of the States. To the contrary, the Constitution

divides authority between federal and state governments *for the protection of individuals*. State sovereignty is not just an end in itself: *Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.*

Id. (internal quotations omitted) (emphasis added). This has always been the principled rationale of our federal system. "It is too early for politicians to presume on our forgetting that the public good, the real welfare of the great body of the people, is the supreme object to be pursued; and that no form of government whatever has any other value than as it may be fitted for the attainment of this object." *The Federalist No. 45*, at 289 (James Madison) (Clinton Rossiter ed., 1961).

Thus, the text and structure of the Constitution, and the Tenth Amendment, place the internal operations of a state beyond the reach of Congress, *e.g.*, *Coyle v. Smith*, 221 U.S. 551 (1911), even if they affect interstate commerce. The rationale for this constitutional rule is that it protects individual liberty. It would therefore be untenable to conclude that the noncommercial, intrastate, personal actions and decisions of individuals were within the reach of Congress because this would be an even more egregious assault on the individual liberty guaranteed by our federal system. If Section 922(q) is upheld, then there is no limit to the power of Congress. Such authority was never delegated by the people, and to permit it creates the very real "risk of tyranny and abuse." *Gregory v. Ashcroft*, 115 L. Ed. at 422.

II

THIS COURT SHOULD NOT ALLOW CONGRESS TO ALTER THE DELICATE BALANCE OF STATE-FEDERAL AUTHORITY

Section 922(q) makes it "unlawful for any individual knowingly to possess a firearm" within 1,000 feet of school property. 18 U.S.C. §§ 922(q)(1)(A), 921(a)(25), 921(a)(26). This prohibition is unconstitutional for two reasons. First, Section 922(q) is more expansive than any other federal regulation enacted under the commerce power because it prohibits personal, intrastate, noncommercial, nontransactional conduct. This fact is illustrated by noting that this Court upheld enactments in both *Wickard v. Filburn*, 317 U.S. 111, 115-17, 130 n.30, where the enactment was applied to the conduct of a commercial wheat farmer, not a weekend gardener; and *Katzenbach v. McClung*, 379 U.S. at 304, where the enactment was applied to Ollie's Barbecue, a commercial establishment, not a backyard family barbecue. Second, it intrudes upon the delicate balance of state-federal relations in the areas of education, local law enforcement, and firearms regulation, areas not only "traditionally regulated by the States," *Ashcroft*, 115 L. Ed. 2d at 423, but so intimately connected with a state's police power that uniform national rule is unwarranted. At the very least, it is ambiguous whether Congress intended to intrude so far into matters so intimately connected with the states' respective police powers, *Ashcroft*, 115 L. Ed. 2d at 430, as well as the personal passive conduct of private citizens with no link to interstate commerce. Therefore, this Court should not attribute such an intent to its legislative counterpart.[2]

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[2] The test for determining the constitutionality of legislation enacted under the Commerce Clause requires that there be a "rational basis for a *congressional* (continued...)

The government claims that, because Congress has clearly proscribed Mr. Lopez' conduct, this Court need not be concerned with whether such an exercise of power has been linked to the Constitution, or whether Congress has even considered the Constitution. Brief of the United States at 30-31. This Court, however, has never allowed this. *E.g.*, *Ashcroft*, 115 L. Ed. 2d at 420-30; *Bass*, 404 U.S. at 339-50; *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 237-47 (1985)(sovereign immunity not abrogated absent plain statement to that effect); *United States v. Tot*, 319 U.S. 463, 463-64, 467 (1943)(gun possessed by felon presumed to be shipped interstate violates due process). "States occupy a special and specific position in our constitutional system and *... the scope of Congress' authority under the Commerce Clause must reflect that position.*" *Garcia v. San Antonio Metropolitan Transit Auth.*, 469 U.S. 528, 556 (1985) (emphasis added).

In *United States v. Bass*, this Court found a federal statute ambiguous as to whether Congress intended to criminalize *any* possession of a firearm by a felon or only those firearms that were proven to have traveled in interstate commerce. 404 U.S. at 337-39. This Court rejected the former "broad reading in the absence of a clearer direction from Congress." *Id.* at 339. Though this Court upheld the same enactment after Congress addressed this constitutional concern, *Scarborough v. United States*, 431 U.S. 563, 566 (1977), (element of crime was that the firearm at one time traveled in interstate commerce), the court below properly stated that it is questionable whether "Congress can

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[2] (...continued)
finding that the regulated activity *affects interstate commerce.*" *Hodel v. Indiana*, 452 U.S. 314, 323 (1981) (emphasis added); *contra* Brief of United States at 14 (which, in light of cases requiring a nexus with interstate commerce, *e.g.*, *Bass*, 404 U.S. 336, misconstrues the constitutional standard). There was no such congressional finding in this case.

constitutionally punish the mere possession of firearms." *Lopez*, 2 F.3d at 1347 (internal quotations omitted). This is especially so when the face of the statute does not contain a nexus with interstate commerce as an element of the crime. *See, e.g., Barrett v. United States*, 423 U.S. 212, 213 n.1, 214 (1976) (statute contained such a nexus and explicit congressional findings of threat to interstate commerce). Even if a nexus were supplied for Section 922(q), there is still no credible analogy between a felon in possession, a teenager in possession, or an ordinary law-abiding citizen in possession (which this statute also reaches). Firearms in the possession of felons are contraband, are nearly impossible to trace through interstate commerce, and thus pose a much greater threat to interstate commerce than the acts criminalized by Section 922(q). Felons in possession also pose a threat less readily dealt with by the states.

Despite this, the government in this case claims that by failing to require any nexus with interstate commerce, Congress did supply the "clearer direction" required in *Bass*, 404 U.S. at 339, even though Section 922(q) intrudes further into state and private interests than any other Commerce Clause measure. *Lopez*, 2 F.3d at 1348-59; *see also, e.g., Champion v. Ames*, 188 U.S. 321 (1903) (prohibition of *interstate transport* of lottery tickets constitutional); *Wickard*, 317 U.S. 111 (use of wheat by a farmer, *who was a member of the cartel approving of the national regulation in question, and engaged in the commercial enterprise of producing and selling wheat*, deemed to have a *substantial economic effect* on interstate commerce); *United States v. Pereira*, 347 U.S. 1 (1954) (punishing the transportation of stolen goods *across state lines* constitutional); *Atlanta Motel*, 379 U.S. 241 (a *commercial enterprise* that catered to *interstate travelers* deemed to "substantially" affect interstate commerce in the *civil rights context*); *Perez v. United States*, 402 U.S. 146 (1971) (intrastate extortionate *credit transactions with a*

commercial business establishment normally conducted by *national* organized crime organizations affect interstate commerce). Past congressional enactments invoking the commerce power have all been clearly linked to interstate commerce. Because Section 922(q) presents such a sharp break in legislative approach, to simply omit any nexus with interstate commerce is unacceptable. *Will v. Michigan Department of State Police,* 491 U.S. 58, 65 (1989).

The position taken by the government ignores the fact that congressional action should be dictated by the Constitution, not that constitutional meaning should be dictated by Congress. This head-in-the-sand approach to the legislative process is precisely what this Court has sought to prevent through its modest requirement that Congress expressly refer to and heed its enumerated constitutional grants of authority. Because the Tenth Amendment is a part of the Bill of Rights, and because the management of education, local law enforcement, and the ownership of ordinary firearms by ordinary citizens have traditionally been a state responsibility, the Gun Free School Zone Act "indisputably represents a singular incursion by the Federal Government into territory long occupied by the States." *Lopez*, 2 F.3d at 1364; *see also* Tex. Penal Code § 46.04(a) (prohibiting possession of firearms on school grounds). Such an incursion enhances the importance of congressional findings and a nexus with interstate commerce.

Furthermore, because these issues are so uniquely within the police power of the respective states, it would not be rational to conclude that the Gun Free School Zones Act was within the commerce power even if Congress had made such a finding. While it may be rational to regulate the possession of illegal firearms by convicted felons in order to protect interstate commerce, and it may be rational to assert jurisdiction when ordinary citizens are engaged in activities

that have substantial repercussions on interstate commerce, it is irrational to federalize simple, purely local, noncommercial firearms possession. "However difficult in application, this principle is essential to the maintenance of our constitutional system." *Santa Cruz Fruit Packing Co. v. NLRB*, 303 U.S. 453, 466 (1938). *See also Scarborough v. United States*, 431 U.S. at 571 ("Congress is aware of the distinction between legislation limited to activities 'in commerce' and an assertion of its full Commerce Clause power so as to cover all activity *substantially affecting interstate commerce.*"); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937) (local activities may be regulated if they have a "close and substantial relation to interstate commerce"); *Wickard*, 317 U.S. at 125 (local activity may be regulated if it has a "substantial economic effect" on interstate commerce); *Russell v. United States*, 471 U.S. 858, 860-61 & n.4 (1985) (property substantially affected interstate commerce only because it was used for commercial purposes); *Michigan Protection and Advocacy Service, Inc. v. Babin*, 799 F. Supp. 695, 735 (E.D. Mich. 1992) ("sole remaining limitation on Congress' power under the Commerce Clause is the requirement that the effect be *substantial*").

No matter what is required of Congress, though, it has failed to make clear that it intended to upset the sensitive federal state balance and intrude into personal, noncommercial, intrastate behavior. For the additional reason that the statute does not even require a nexus to interstate commerce, it is invalid.

III

THIS CASE PRESENTS A RARE INSTANCE WHERE THE JUDICIARY MUST ACT AS A CHECK ON CONGRESS

Though Commerce Clause jurisprudence has adapted through the transition from a local to a national economy, *EEOC v. Wyoming*, 460 U.S. 226, 247 (1983) (Stevens, J., concurring), this grant of authority is not unlimited. Unfortunately, though, as Circuit Judge Buckley stated: "[I]t is virtually impossible to conjure up any human activity (with the possible exception of day-dreaming) that some court will not find to burden interstate commerce." James L. Buckley, *Federalism and the Scope of the Federal Criminal Law*, 26 AM. CRIM. L. REV. 1737, 1738 (1989). Should this Court decline to affirm the Fifth Circuit's decision, Judge Buckley's facetious comment will become reality.

A. Judicial Deference to Congressional Ambiguity Would Be Inappropriate in This Instance

The Gun Free School Zones Act is among the most far reaching of congressional enactments, improperly federalizing wholly private, noncommercial, nontransactional, intrastate acts by individuals that have no effect on interstate commerce. It also displaces local law, as in the present case, which may be better tailored to local conditions to avoid the absurd results that Section 922(q) could engender. This is wholly inappropriate, considering the fact that mere possession of an ordinary firearm, as well as the constitutional balance between state and federal interests, are admittedly protected by several provisions of the Bill of Rights. *E.g.*, The Firearms Owners' Protection Act of 1986, Pub. L. No. 99-308, 100 Stat. 449-461 (currently at 18 U.S.C. § 921 (Note) (protecting rights secured under the

Second, Fifth, and Tenth Amendments)). *Cf. Carolene Products*, 304 U.S. at 152 n.4 (narrower presumption of constitutionality when legislation frustrates political processes or reaches within the first ten amendments).[3] It would therefore be inappropriate for this Court to defer to Congress.

As the Fifth Circuit noted, the Tenth Amendment is as much a part of the first ten amendments as the First Amendment. Just as Congress is constrained from regulating the commerce of publishing, it too is constrained from intruding into matters reserved to the states and to the people. *New York v. United States*, 120 L. Ed. 2d at 137. Thus, it reaffirms, and provides a rule of construction for, the limits imposed on the exercise of the congressional power contained in the text of the Constitution and its other amendments. *Id.*

Additionally, no matter how one interprets the Second Amendment,[4] it exists. This amendment, while controversial, indisputably affords protection against federal intrusion into the "right of the people to keep and bear Arms." U.S. Const. Amend. II. The controversy attaches to whether that right is a States' right or an individual one. *Compare* Laurence H. Tribe, *American Constitutional Law* 299 n.6 (2d ed. 1988) *with* Amicus Brief on Behalf of Academics for the Second Amendment, *et al.*, *and* Don B.

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[3] Because Section 922(q) also reaches private conduct, it may raise Fourth Amendment and due process concerns. *See, e.g., Planned Parenthood v. Casey*, 505 U.S. ___, 120 L. Ed. 2d 674 (1992); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

[4] "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. Amend. II.

Kates, *The Second Amendment and the Ideology of Self-Protection*, 9 CONST. COMMENTARY 87 (1992).

Thus, the Second Amendment, along with the Tenth Amendment and the specific enumerations of congressional power, do not permit federal prohibition of the mere possession of ordinary firearms by ordinary citizens, either as an individual right, or because it is a power retained by the States. Furthermore, Article I of the Constitution recognizes this reserved States' right by explicitly "reserving to the States respectively" at least some authority over the militia. U.S. Const. Art. I, § 8, cl. 3.[5] Hence, Texas has prohibited children from bringing guns to school, but it still allows sportsmen, farmers, or those concerned with home defense who live near schools the liberty to exercise their rights. The federal act, though, reaches too far.

Under this act, Congress has exceeded one of its constitutional prerogatives, and it is the duty of the judiciary

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[5] Many states today also have laws which provide for an "unorganized militia," comprised of the entire military-age male populace. *See, e.g*, Cal. Mil. & Vet. Code §§ 120-23. "The militia of the State shall consist of ... [*inter alia*] the unorganized militia." *Id.* § 120. These statutory provisions vest the Governor with the authority to call out the National Guard and "the unorganized militia." *Id.* § 128. "The unorganized militia may be called for active duty in case of war, rebellion, insurrection, invasion, tumult, riot ...." *Id.* Based on events in the recent history of this country, it is not unreasonable to think that it might be necessary to place some reliance on an unorganized self-armed militia if the United States were to become involved in a military conflict as large as the Persian Gulf War, when most of the National Guard was mobilized and sent overseas, and at the same time be faced with local domestic difficulties as California has experienced in recent years, including earthquakes, fires, and riots. By prohibiting the ordinary possession of ordinary handguns by law-abiding citizens, Congress effectively prevents this necessary option, denying not only individuals, but the States, the opportunity to maintain and protect themselves. This flies directly in the face of our Constitution, which "looks to an indestructible Union, composed of indestructible States." *Ashcroft*, 115 L. Ed. 2d at 422.

to correct the "encroachments and oppressions of the representative body." *The Federalist No. 78*, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961). The fact that Congress did not require a nexus with interstate commerce on the face of its enactment lends proof to the fact that it did not adequately consider the intrusion it was effecting into matters traditionally and primarily left to the States. *E.g., Ashcroft*, 115 L. Ed. 2d at 426, 430; *Bass*, 404 U.S. at 350. Should this Court find some sort of psychoanalyzed congressional intent, *Chisom v. Roemer*, 501 U.S. ___, 115 L. Ed. 2d 348, 378 (1991) (Scalia, J., dissenting), within the Gun Free School Zones Act and rule otherwise, the enumeration of Article I powers becomes meaningless verbiage, allowing Congress to reach into absolutely any area regardless of the nexus such conduct might have with interstate commerce.

This is especially so because Section 922(q) reaches not only Mr. Lopez' possession of a gun on school property, but also what otherwise would be legal handgun possession, 2 F.3d at 1346 n.4, 1366, 1367, marking a more egregious "inroad" than the original "felon in possession" statute in *Bass*, 404 U.S. at 339. The Gun Free School Zone Act, as such, was enacted for the evening news, not to protect interstate commerce. While Mr. Lopez, as a teenager possessing a firearm at school, could and should be prosecuted under the applicable criminal statutes of the State of Texas, it is beyond the reach of Congress to so punish.[6]

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[6] Additionally, the government's claim that Congress places no obligation on the States, Brief of the United States at 28-29, is fallacious. Section 922(q)(1)(B)(ii) requires the States to license firearms and to "verify that the individual is qualified under law to receive the license." As such, the federal government is commandeering the "legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." *New York v. United States*, 120 L. Ed. 2d at 140. *See also Printz v. United States*, No. CV 94-35-M-

(continued...)

As Chief Justice Marshall said when the Supreme Court recognized the constitutional limits imposed on *its* jurisdiction: "To what purposes are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained." *Marbury v. Madison*, 5 U.S. 135, 176 (1803).

With regard to Section 922(q), deference to the political process would be inappropriate, considering the fact that the political process in this case has produced an obviously flawed product. *See Ashcroft*, 115 L. Ed. 2d at 426. "[T]o give state displacing weight of federal law to mere congressional *ambiguity* would evade the very procedure for lawmaking on which [*Garcia*, 469 U.S. 528] relied to protect states' interests." *Id.* (quoting *Tribe, supra* at 480). *See also Bass*, 404 U.S. at 339. Thus, the courts must act as "bulwarks of a limited Constitution against legislative encroachments." *The Federalist No. 78, supra*, at 469. Fulfilling such a duty is hardly judicial activism. "It only supposes that the power of the people is superior to both, and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former." *Id.* at 468.

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[6] (...continued)
CCL, 1994 WL 200058 (D. Mont. May 16, 1994). Under this command, if someone walks across a public sidewalk located within 1,000 feet of a school to his house with a .22 caliber rifle after returning from hunting, that individual is committing a federal crime unless the State enacts a licensing mechanism for that individual. *See* 18 U.S.C. § 922(q)(1)(B)(i), (ii), (iii). Also, States that already have (concealed-carry) licensing procedures, *e.g.*, California, Cal. Penal Code §§ 12050, *et seq.*, normally have very strict limitations for issuing a license which will conflict with the vague mandates of Section 922(q). Finally, these concealed-carry permits generally apply only to certain weapons (usually handguns). In effect, then, Section 922(q) presents a burdensome and confusing array of options for the States and firearms owners who live near or travel within 1,000 feet of school property.

Excessive deference to the legislative branch, especially when an enactment lacks a nexus to that body's constitutional authority, is the mirror image of the "legislation by judicial fiat" so often complained about by unsuccessful litigants and dissenting jurists. Excessive judicial deference and judicial activism both allow the union of law making and law interpreting in one body. While judicial activism may undermine the republican spirit of our tripartite constitutional order, the obeisant deference of the judiciary to the Legislature undermines our individual liberty, by abandoning the constitutional duty "to declare all acts contrary to the manifest tenor of the Constitution void." *Id.* at 466. *See also Marbury v. Madison*, 5 U.S. at 175-76; *Taylor v. Beckham*, 178 U.S. 548, 609 (1900) (Harlan, J., dissenting). The Fifth Circuit did this by declaring Section 922(q) contrary to the manifest tenor of the Constitution. This Court must do the same.

B. The Intent of the Ratifiers Limits the Reach of Congress to Its Enumerated Powers

In 1787, the individual States of this country were presented with a new constitution that provided for a federal system where certain enumerated powers were delegated to the national government. Many of the Ratifiers of the Constitution, however, feared that the national government would ignore the jurisdictional restraints imposed on it by the proposed constitution in the form of its few and defined delegated powers and threaten state sovereignty and personal liberty. *See generally* Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 U. VA. L. REV. 1387 (1987); William Van Alstyne, *Dual Sovereignty, Federalism and National Criminal Law: Modernist Constitutional Doctrine and the Nonrole of the Supreme Court*, 26 AM. CRIM. L. REV. 1740 (1989); John G. Schmidt, Jr., *The Tenth Amendment: A "New" Limitation on Congressional Commerce*

Power, 45 RUTGERS L. REV. 417 (1993). Such a government, located thousands of miles from its constituents, could, many thought, become isolated from its constituents, corrupt, and self-perpetuating. "After we have given them all our money, established them in a federal town, given them the power ... to establish their arbitrary government, what resources do the people have left?" II THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787 at 62 (Jonathan Elliot ed., 2d ed. 1836) (Elliot's Debates).

Many of the Ratifiers predicted that the powers granted to the federal government by the proposed constitution would result in the despotism of an unresponsive aristocracy within the federal district. "What an inexhaustible Fountain of Corruption are we opening?" Letter of Samuel Osgood to Samuel Adams (Jan. 5 1788), *reprinted* in I THE DEBATE ON THE CONSTITUTION 704, 708 (Library of America 1993). "Liberty! What is Liberty? The power of governing yourselves. If you adopt this Constitution, have you this power? No: you give it into the hands of a set of men who live one thousand miles distant from you." IV ELLIOT'S DEBATES, supra, at 313.

In an attempt to calm these fears, and assure ratification, the Federalists claimed that the structure of the Constitution would actually protect state sovereignty and personal liberty. *The Federalist No. 10* (James Madison). Madison described this structure in *The Federalist No. 52*:

> In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments.

> Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.

Id. at 323 (James Madison) (Clinton Rossiter ed., 1961). That the power was divided between the two governments is evident in the text of the Constitution itself, with "the great and aggregate interests being referred to the national, the local and particular to the State legislatures." *The Federalist No. 10,* at 83 (James Madison) (Clinton Rossiter ed., 1961). "The powers reserved to the several States will extend to all objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State." *The Federalist No. 45, supra*, at 292-93.

Alexander Hamilton noted that the administration of criminal justice was reserved to the States. *The Federalist No. 17,* at 120 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

> This, of all others, is the most powerful, most universal, and most attractive source of popular obedience and attachment. It is this which, being the immediate and visible guardian of life and property, having its benefits and its terrors in constant activity before the public eye ... contributes more than any other circumstance to ... render [the states] at all times a complete counterpoise ... to the power of the Union.

Id.

By comparison, the powers delegated to the federal government were described as "few and defined." *The*

Federalist No. 45, supra, at 292. These few and defined powers, as described by de Tocqueville, "have been confined to a certain sphere; and although the despotism of the majority may be galling upon one point, it cannot be said to extend to all." Alexis de Tocqueville, DEMOCRACY IN AMERICA 170 (Henry Reeve trans., Henry Steele Commager, ed. 1839). Those who opposed the ratification of the proposed constitution were not convinced, though. They wanted a Bill of Rights to assure state sovereignty and individual liberty. In the Virginia ratification debates, George Mason wondered why, if these two items were not "given up, where are they secured? Let the gentlemen show that they are secured in a plain, direct, unequivocal manner." III ELLIOT'S DEBATES, *supra* at 266. *See also* George Mason, "Objections to the Constitution," *reprinted in* I THE DEBATE ON THE CONSTITUTION, *supra*, at 345-49. After the Constitution was ratified these two items were secured by the Bill of Rights, which includes the Tenth Amendment's reiteration of the textual limits on the federal government. *New York v. United States*, 120 L. Ed. 2d at 137-38.

It should also be noted that the characterization of the powers of the federal government as few and defined came before the adoption of the Bill of Rights. In fact, Hamilton predicted that the adoption of a Bill of Rights would give the federal government the "colorable pretext" to run roughshod over the jurisdictional restraints imposed on it in the text of the Constitution by legislating right up to the edge of whatever individual rights were enumerated. *The Federalist No. 84*, at 513 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Section 922(q) epitomizes the fears and concerns of the Ratifiers of the Constitution and betrays their intent.

C. The Gun Free School Zones Act Renders Article I of the Constitution Meaningless

1. There Is No Authority for Section 922(q) in the Commerce Clause

The purpose of the Commerce Clause was to quell interstate trade rivalries and to meet the challenges of foreign competition. *The Federalist No. 42*, at 266-69 (James Madison) (Clinton Rossiter ed., 1961). Even in *Gibbons v. Ogden*, 22 U.S. 1, which is often cited for the broad power Congress has under the Commerce Clause, this Court declared that federal power to regulate commerce was "complete in itself, may be exercised to its utmost extent, and acknowledges no limitations *other than those prescribed in the constitution.*" *Id.* at 196, *quoted in, e.g., United States v. Darby*, 312 U.S. 100, 114 (1941) (emphasis added). One such limitation is that Congress can only regulate *commerce*. The *Ogden* Court defined "commerce" as "commercial intercourse." *Id.* at 189-90; *see also United States v. Mennuti*, 639 F.2d 107, 109-10 (2d Cir. 1981) (noting that *Ogden, Wickard, Atlanta Motel, Jones & Laughlin Steel Co., Katzenbach v. McClung*, and *Perez* all involved businesses or their transactions). Samuel Johnson's DICTIONARY OF THE ENGLISH LANGUAGE (3d ed. 1765) defined commerce as "[i]ntercourse, exchange of one thing for another, interchange of anything; trade; traffick." Raoul Berger, FEDERALISM: THE FOUNDERS' DESIGN 123 (1987). This definition remains substantially unchanged to this day: "Exchange between men of the products of nature or art; buying and selling together; trading; exchange of merchandise." THE COMPACT OXFORD ENGLISH DICTIONARY 295 (2d ed. 1992). Not every facet of American life can be said to be commercial intercourse, or to have a substantial effect on such intercourse. If Section 922(q) is upheld, however, this truth will be rendered a nullity.

Another limitation prescribed by the Commerce Clause is that the commerce must be among the several States. "The enumeration [of particular classes of commerce] presupposes something not enumerated." *Ogden*, 22 U.S. at 194-95. *See also, e.g., Russell*, 471 U.S. at 860-61 & n.4 (residential property substantially affected interstate commerce under federal arson statute only because it was used for commercial purposes). *United States v. Voss*, 787 F.2d 393, 397 (8th Cir. 1986) (vacant residence owned by a business and insured by interstate insurer does not affect interstate commerce); *Babin*, 799 F. Supp. at 728-35. As this Court stated in *Maryland v. Wirtz*, 392 U.S. 183, 196 (1968), *overruled on other grounds by National League of Cities v. Usery*, 426 U.S. 833 (1976), federal power is limited to "'commerce,' and not all commerce but 'commerce ... among the several States.' The expansion of enterprise has vastly increased the interests of interstate commerce but the constitutional difference still obtains." *Id.* The Constitution itself, read logically and with knowledge of the intent of the Ratifiers, should limit congressional authority over an activity *only if it was both "among the several States" and "Commerce."* This Court should thus hold that Section 922(q) is not within the commerce power.

2. There Is No Authority for Section 922(q) in the Necessary and Proper Clause

Even an analysis that attempts to borrow from the Necessary and Proper Clause, U.S. Const. Art. I, § 8, cl. 18, to find congressional authority for Section 922(q) fails. By comparing the present case to *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, a case that looked to the Necessary and Proper Clause, the shortcomings of the present statute become even more evident. As discussed by the court below, the present enactment goes even further than

the unconstitutional statute in *The Civil Rights Cases*. *Lopez*, 2 F.3d at 1364 n.47.

The Civil Rights Act of 1964, at issue in *Atlanta Motel*, stated, on its face, that it was "only" applicable to *business* establishments that were found to *affect interstate commerce* or were supported by state action. 379 U.S at 247. By comparison, the Gun Free School Zones Act is not limited in its scope to business establishments or those transacting with such establishments, but to any individual who possesses an ordinary firearm within 1,000 feet of school property. Will Congress next seek to expand the zones to encompass the cities and towns where the schools or businesses are located? Could it also ban all guns within 1,000 *miles* when it finds that the 1,000 foot zones are not enough? If the commerce power may justify the present enactment, it is boundless. "The underlying thought is merely this, that the law is not indifferent to considerations of degree." *Carter v. Carter Coal Co.*, 298 U.S. 238, 327 (1936) (Cardozo, J., separate opinion).

An additional difference between *Atlanta Motel* and the present case is that the Court in *Atlanta Motel* had before it ample proof that Congress had considered the constitutional ramifications and bases of its enactment. 379 U.S. at 244-53. *See also Katzenbach v. McClung*, 379 U.S. at 302. There is no such proof here.[7] Even in these two civil rights cases which justify the furthest reach of Congress to regulate local commercial activities "to foster and protect interstate commerce," 379 U.S. at 272, Congress explicitly relied on a nexus with interstate commerce. The Court also had

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[7] Indeed, because legislative history is often unreliable, *Tafflin v. Levitt*, 493 U.S. 455, 472 (1990) (Scalia, J., concurring), the government's citation to myriad educational, sociological, psychological and political authorities, *see Brief of the United States* at VII-IX (Table of Authorities), is also suspect, if not irrelevant.

available to it a record of legislative history replete with evidence, not that discrimination was an evil worthy of attack,[8] but of local, commercial activities burdening interstate commerce. *Atlanta Motel*, 379 U.S. at 245-53, 257, 261; *Katzenbach v. McClung*, 379 U.S. at 299-301. Thereafter, the Court also concluded that it was necessary and proper for Congress to regulate these local, commercial activities because they had "a substantial and harmful effect" on interstate commerce. *Atlanta Motel*, 379 U.S. at 258.

It would be improper for this Court to reverse the Fifth Circuit's decision, in effect, doing what Congress itself failed to do in finding its authority within the Constitution. To do so would "obliterate what is national and what is local," *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. at 37, via congressional ambiguity. For the simple reason that Section 922(q), unlike the enactments at issue in *Atlanta Motel* and *Katzenbach v. McClung*, reaches behavior that is purely local, private, nontransactional, and noncommercial, it is not a necessary or proper exercise of congressional power. This is especially so because state and local law enforcement efforts are much better suited to deal with local illegal ordinary firearms possession. "Congress is simply not as well equipped as state legislators to make decisions involving purely local needs." *EEOC v. Wyoming*, 460 U.S. at 263 n.8 (Burger, C.J., dissenting); *see also New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932). In fact, the federal prosecution in this case, as well as the enactment, were wholly superfluous to bringing Mr. Lopez to justice.

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[8] *C.f.*, the government's attempt to extrapolate evidence of the evils of violence into an economic effect of such violence on interstate commerce. Brief of the United States at 19-20 (quoting a gun control activist discussing the effect that a fearful environment has on the learning ability of children). Were such evidence relevant, it might also be applied to federalize family discipline, playground fisticuffs, the content of Stephen King novels, or even the content of childhood nightmares.

He was initially dealt with by educational officials and local police. *Lopez*, 2 F.3d at 1345.

By respecting the sovereignty of the states, and the authority of the people of their respective states to shape their governments to their local needs, this Court will further the public safety by recognizing the impropriety of Section 922(q). If Section 922(q) is struck down, "the People would govern themselves more easily, the Laws of each State being well adapted to its own Genius & Circumstances, and the Liberties of the United States would be more secure." Letter of Samuel Adams to Richard Henry Lee (Dec. 3, 1787), *reprinted in* I THE DEBATE ON THE CONSTITUTION, *supra*, at 47 (emphasis in original).[9]

3. There Is No Authority for Section 922(q) in Any Other Provision of Article I

Reading Article I of the Constitution as a whole provides further evidence that the Gun Free School Zones Act is invalid. Under Article I, Congress is given authority

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[9] Additionally, a primary consideration of the judiciary when upholding federal regulation is whether excluding a given activity from "the scheme of [federal] regulation would have a substantial effect in defeating and obstructing its purpose." *E.g.*, *Wickard*, 317 U.S. at 129. This rationale has no application to the present case. The federal government may enforce its law against illegal firearms transactions, transportation, or other such acts having a nexus with interstate commerce, while Texas and its political subdivisions are fully capable of enforcing their laws locally. Neither the federal, nor the local, scheme will be thwarted by limiting the authorities to their respective jurisdictions. Any overlap into purely intrastate affairs will actually result in a waste of resources, as in the present case (where Mr. Lopez was arrested by state authorities), and/or a dilution of the republican accountability our federal system seeks to protect. *Cf. New York v. United States*, 120 L. Ed. 2d at 154-56. In other words, federal criminalization of purely local crimes will allow state officials to deflect responsibility for high crime rates by claiming they are hampered by federal interference, or alternatively, by a lack of federal effort. The Fifth Circuit removed such unrepublican obfuscation.

to punish select crimes such as counterfeiting, maritime piracy, and military crimes. U.S. Const. Art. I, § 8, cls. 6, 10, and 16. Under Article III, it is also given the power to define the punishment for treason. *Id.* Art. III, § 3, cl. 2. These are the sole grants of congressional authority in the realm of criminal law. Furthermore, if Congress can regulate *any* human activity under its commerce power, then the clause granting the power of "exclusive Legislation in all Cases whatsoever" in the District of Columbia, U.S. Const. Art. I, § 8, cl. 17, is redundant. This is further support for the conclusion that Section 922(q) goes well beyond what the Constitution may tolerate. *Van Alstyne, supra*, at 1746.

As this Court stated in *New York v. United States*, 120 L. Ed. 2d at 137: "If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States." *Id.* Such is the case with maritime piracy. But "if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress." *Id.* Such is the case with purely local crime, firearms regulation, education, and the noncommercial, intrastate acts of individuals, which are reserved to the States and to the people. Otherwise, "the chain of causation is virtually infinite, and hence there is no private activity, no matter how local and insignificant, the ripple effect from which is not in some theoretical measure ultimately felt beyond the borders of the state in which it took place." *Lopez*, 2 F.3d at 1362.

CONCLUSION

By upholding Section 922(q), this Court may be appeasing what some might portray as protection of our children, or ending violence in our cities, both very important ends. At the very least, though, Congress has

made this impossible by failing to find a link with interstate commerce, and by failing to require it as an element of the crime. Under the Gun Free School Zones Act, Congress seeks to do the same in the 50 states as it may do in the District of Columbia--exercise a general police power. By so doing, it undermines the sanctity of our written Constitution, turning that compact and its express protections from tyranny, into a manipulable series of suggestions that may be disregarded at will.

The Fifth Circuit took a very restrained account of individual liberty and the principles of federalism in declaring Section 922(q) beyond the scope of congressional commerce power. Congress has intruded too far into an area better left to the States and to the people--passive, individual, noncommercial, nontransactional, intrastate acts--upsetting the delicate state-federal balance. This Court should therefore adopt and expand upon the lower court's reasoning.

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Respectfully submitted,

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